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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

**REPLY COMMENTS OF
AMERICAN COMMUNICATIONS SERVICES, INC.**

American Communications Services, Inc. (ACSI), by its attorneys, hereby submits this reply to the separate comments received on dialing parity, access to rights of way, and other issues raised in the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹

In its initial comments, ACSI urged the Commission to adopt national standards for access to rights of way, dialing parity pursuant to Section 251(b)(3), ILEC notifications of technical changes, and for the fair and efficient administration of telephone numbering resources. ACSI continues to recommend that the Commission act promptly to establish explicit rules in each of these areas. ACSI will focus these reply comments solely on the issue of access by new entrants to incumbent local exchange carrier (ILEC) and utility company (Utilities) rights of way, due to the critical importance of such access to the ability

¹ FCC 96-182 (released April 19, 1996). ACSI submitted initial comments on second round issues on May 20, 1996.

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of ACSI and other facilities-based providers to offer competitive local telecommunications services.

Introduction and Summary

The Telecommunications Act of 1996 (1996 Act) takes a significant step to promote the deployment of alternative local networks by creating an affirmative obligation, for every ILEC and Utility, to provide nondiscriminatory access to any pole, duct, conduit, or right of way it owns or controls.² Nevertheless, in their initial comments in this proceeding, the Utility commenters were nearly unanimous in their desire to have the Commission disregard or diminish this clear mandate. Specifically, the Utilities urged the Commission to adopt policies which would grant them broad discretion to refuse access to critical rights of way whenever -- in their own view -- capacity is constrained or providing access would raise concerns for safety or network reliability. ACSI believes strongly that providing such leeway would permit Utilities to arbitrarily refuse access and discriminate between service providers, and, thereby, undermine the pro-competitive purposes of the 1996 Act.

Thus, explicit national standards are necessary to ensure that the Act's obligations are met by all providers in ways that are consistent with the development of competition in local telecommunications services. Specifically, the Commission should emphasize that the presumption will be in favor of access, and that the burden of proof will be on the ILEC or Utility seeking to deny access to a right of way. In addition, the

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47 U.S.C. §§ 251(b)(4); 224(f).

Commission should narrowly construe the statutory exceptions to access, and should allow these exceptions only when supported by objective, industry-wide standards for capacity, safety or reliability. Finally, the Commission should ensure that all service providers pay the same rate for the same type of access.

Discussion

I. UNIFORM NATIONAL STANDARDS ARE NEEDED FOR ACCESS TO RIGHTS OF WAY

Ironically, the comments of the ILECs and Utilities provide a good example why national rules are needed. Although the 1996 Act creates an affirmative obligation to provide access to rights of way, these parties contend that the obligation should vary greatly depending upon the ILEC or Utility, the pole, conduit or right of way, and other fact-specific circumstances.³ In particular, some ILECs and Utilities claimed differing -- and expansive -- rights to deny access based upon the limited exceptions enumerated in Section 224(f)(2).⁴ The 1996 Act, however, imposes a single set of obligations upon all ILECs and Utilities to provide nondiscriminatory access to their poles, ducts, conduits, and other rights of way. Although the application of these standards will vary depending upon the particular type of access requested, the obligation itself is not variable. National standards are necessary to

³ See, e.g., Joint Comments of American Electric Power Service Corporation, et al., at 18-20 (hereinafter "Joint Utility Comments").

⁴ This section allows electric utilities to deny access only if "there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

ensure that ILECs and Utilities across the nation apply the same criteria in determining when access is "nondiscriminatory."

II. EXCEPTIONS TO THE DUTY TO PROVIDE ACCESS TO RIGHTS OF WAY MUST BE NARROWLY TAILORED

Particular emphasis should be placed on enumerating the standards for application of Section 224(f)(2). This section excepts access for four specific reasons: insufficient capacity, safety, reliability, and "generally applicable engineering purposes."⁵ If left undefined by the Commission, these exceptions likely will, at best, generate a significant number of disputes (some of which will have to be resolved by the Commission) regarding their meaning, and, at worst, be used as an enormous loophole to thwart Congress' policy of nondiscriminatory access. Indeed, some Utilities already are claiming these exceptions allow them to deny access in their sole (and unreviewable) discretion.⁶

The exceptions provided in Section 224(f)(2) should be narrowly construed. In general, such exceptions should apply only when the requested access would violate *generally-accepted industry standards* for capacity, safety, reliability, or engineering. Although the Commission need not, and should not, adopt specific codes in its rules, examples of such industry standards include the National Electric Code, National Electric Safety Code, standards of the American National Standards Institute (ANSI) or the IEEE, and regulations of the Occupational Safety and Health Administration (OSHA). A Utility seeking to deny access must identify with specificity the condition or conditions that violate

⁵ 47 U.S.C. § 224(f)(2).

⁶ See, e.g., Joint Utility Comments at 21, 26.

one of these industry norms. It should *not* be permitted to rely on unenumerated or company-specific "standards" as a reason for denying access. Moreover, the Utility should bear the burden of demonstrating that providing the requested access is inconsistent with such generally-accepted industry norms.

With these principles in mind, ACSI offers the following specific comments on each of the exceptions enumerated in Section 224(f)(2):

Insufficient Capacity -- Capacity should be determined by reference to accepted industry norms and physical space considerations. Utilities should not be given *carte blanche* to reserve capacity for their own future use.⁷ Instead, Utilities should be required to provide access as long as there is sufficient capacity to accommodate existing parties using the right of way, the Utility's existing needs, and the Utility's specifically-identified expansion plans. A planning period of no more than two to three years should be permitted for this purpose. Moreover, despite their protestations, the Commission must obligate Utilities to allocate capacity in a nondiscriminatory manner where shortages exist.

Safety, Reliability and Generally-Applicable Engineering Purposes -- Utilities should be permitted to deny access only in circumstances where the access would violate industry-wide standards such as the National Electrical Safety Code or fails to meet an identifiable standard of care imposed by the laws of a state or of the United States. As with other considerations, reliability or engineering considerations must be objective and must be identifiable in *generally accepted* industry standards. Utilities should not be

⁷ See, e.g., Joint Utility Comments at 28; Kansas City Power & Light Comments at 4 (KCPL Comments); Virginia Power Comments at 7.

permitted to rely on ill-defined or self-established safety, reliability or engineering considerations in denying access.

Furthermore, a Utility should not be permitted, allegedly in the interest of "safety" or "reliability," to impose unreasonable costs on parties using its rights of way. For example, while ACSI does not object to the presence of a Utility employee when it is necessary to monitor on-site visits by third-parties obtaining access under Section 224, the Utility must allow requesting carriers to make arrangements where possible to avoid the need for such supervision. ACSI urges the Commission to require a Utility to allow a CLEC to construct its own manholes and handholds adjacent to Utility conduits sufficient to enable the CLEC to access its facilities directly. When it is not feasible to construct such independent access, it is appropriate to require supervised access, but provision must be made for emerging access by the CLEC.⁸

III. CHARGES FOR ACCESS TO RIGHTS OF WAY MUST BE THE SAME FOR ALL SERVICE PROVIDERS

In their initial comments,⁹ several Utilities urged to Commission to permit them to include a variety of costs in calculating their rates for providing access to rights of way. While this is an important issue, the more critical point is that the rates must be nondiscriminatory.¹⁰ Specifically, ACSI urges that the Commission clarify that the same

⁸ If supervision is necessary, a carrier should pay no more than a cost-based charge for the Utility personnel's time.

⁹ *E.g.*, Joint Utility Comments at 55; Virginia Power Comments at 19-20.

¹⁰ 47 U.S.C. § 224(b).

rates must be charged for access to rights of way to *all* entities providing telecommunications services, including CATV providers, Utility-affiliates, and the Utilities themselves. To do otherwise would position Utilities to confer a significant and artificial cost advantage upon itself, its affiliates or favored carriers.

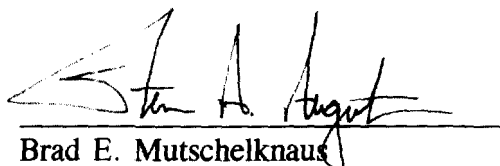
Conclusion

For the foregoing reasons, the Commission should act promptly to ensure access to rights of way are made available on a nondiscriminatory basis. It should place the burden on ILECs or Utilities seeking to deny access to justify their refusal with reference to generally accepted, objective industry standards concerning capacity, safety or reliability.

Respectfully submitted,

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